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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 315

JOHN KASPER, *Petitioner*,

v.

D. J. BRITTAIN, JR., J. M. BURKHART, W. B. LEWALLEN, SIDNEY DAVIS, and WALTER E. FISCHER, *Appellees*.

PETITION FOR REHEARING

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Since the issues in this case were presented to this Court and the lower courts there have been developments which seem to clearly indicate the desirability, if not the necessity, of this Court clarifying the confusion which exists regarding the enforcement procedures to be followed as a result of the decision of this Court in *Brown* v. *Board of Education*, 347 U.S. 483.

The Brown case was bottomed on the 14th Amendment and that amendment also provides:

> "The Congress shall have power to enforce by appropriate legislation the provisions of this Article."

Since the Congress has not implemented the 14th Amendment with respect to integrating the state supported public schools, the procedures followed in the instant case and other such cases is projecting the Federal Courts into a legal wilderness which has the courts indulging in judicial legislation.

The 15th Amendment conferring the right to vote contains the same provision as the 14th Amendment in that its enforcement shall be by appropriate legislation. The last Congress, after extensive hearings and debate passed the so-called "Civil Rights Bill" providing injunctive procedures to protect the right to vote. Until the Congress acts to provide enforcement legislation in respect to integrating state supported public schools the dilemma will only be increased as time goes on. If the Federal Courts have the injunctive power utilized in the instant case, then there was no necessity for such extensive hearings, debate and legislative action as the last Congress rendered respecting the 15th Amendment.

Clearly the Congress did not waste all of this time on moot procedures respecting the protection of the right to vote, and this clearly points out the necessity of enforcement legislation of a corresponding type under the 14th Amendment to give the Federal Courts the injunctive power that was exercised in this case. This same injunction was used to bring 18 defendants into the Federal District Court in Knoxville charged with conspiracy to violate the injunction issued in this case, and 7 of them were convicted, including this petitioner. Since other federal courts (Nashville and Little Rock) are using this injunctive procedure to enforce integration, the Courts will feel the impact more and more

as the judicial legislative process broadens and surely it will.

The Courts have only such jurisdiction as conferred under the Constitution and acts of Congress and since both are dormant on enforcement of integration of state supported public schools, the illegality broadens and the dilemma increases with time.

The Supreme Court, in refusing to grant a review of the conviction of John Kasper, is refusing to review the question of whether action by a private individual against the rights of Negroes, which is not subject to the cognizance of the Federal courts, becomes subject to federal cognizance by the introduction into the picture of a court order on desegregation of schools. It is a new question because it runs contrary to decisions saying acts of private individuals cannot deprive Negroes of rights conferred by the Fourteenth Amendment; and because no private persons have ever been jailed for acts against Negroes allegedly interfering with the carrying out of court orders grounded on the Fourteenth Amendment. It is a tremendously significant question in terms of our political arrangements under the United States Constitution, because it raises the issue of whether Federal authority under the Fourteenth Amendment shall be extended from cognizance over acts of public officials to cognizance over acts of private individuals.

It is also a question raising grave issues of liberty and justice. John Kasper has been sentenced to a Federal jail for one year. Should one year of his life and liberty be taken away without the Supreme Court answering this new and significant question of whether Federal authority grounded on the Fourteenth Amend-

ment extends to the acts of private individuals against Negroes. If Federal authority does not extend to the acts of private individuals in this case, then the conviction and jailing of John Kasper will have deprived him of rights of free speech. He stands convicted for a speech in front of a court house urging private citizens not to allow integration to take place at Clinton High School. The Supreme Court has ever been alert to protect the rights and liberties of convicted criminals, to see that they are given the last right, even of a merely procedural and formal nature, which is due a person no matter how heinous the crimes, even communists advocating the overthrow of our government by force and violence. Is there some reason why it should do less for the petitioner?

The injunction in this case is so broadly worded that it is void on its face because it cuts across the 1st Amendment of the Constitution. Its injunctive clause provides:

> "It is ordered and decreed by the Court that the aforementioned persons, their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them be and they hereby are enjoined and prohibited from further hindering, obstructing, or in any wise interfering with the carrying out of the aforesaid order of this Court, or from picketing Clinton High School, either by words or acts or otherwise."

The broad injunction issued in this case has been used in a conspiracy case in Knoxville and similar broadly worded injunctions have been issued in the Federal District Courts in Nashville and Little Rock.

The "freedom of speech" issue, we respectfully submit, needs to be re-examined in the light of recent decisions of this Court.

This Court on June 17, 1957, decided the case of *Yates et al* v. *United States*, 77 S. Ct. 1064, and the issues in that case were whether or not it was a violation of the Smith Act "to advocate and teach the duty and necessity of overthrowing the government of the United States by force and violence and (2) to organize as the communists party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit."

This Court meticulously examined the issues raised and the evidence (page 1081). The Court supported the right of persons in that case to advocate the overthrow of our government by force and violence so long as it clearly remained in the realm of advocacy. The Court stated (page 1083):

> Moreover, apart from the inadequacy of the evidence to show, at best, more than the abstract advocacy and teaching of forcible overthrow by the Party, it is difficult to perceive how the requisite specific intent to accomplish such overthrow could be deemed proved by a showing of mere membership, or the holding of office in the Communist Party. We therefore think that as to these petitioners the evidence was entirely too meagre to justify putting them to a new trial, and that their acquittal should be ordered.

The Petitioner would respectfully urge the Court to examine the advocacy of the Petitioner in this case. He advocated re-segregating Clinton High School. He

did not advocate violence at any time and he was not involved in any violence. The subject matter of his speech is the same as all segregationists believe in, namely, separate schools for the white and colored children. The colored children remained in school continuously and were not molested.

When the Yates case is considered as a criterion for the instant case in relation to "freedom of speech" the significance pales by comparison, hence, so many cryptic comments regarding segregationists' constitutional rights as compared to communists'.

In the Knoxville conspiracy case, six of the persons convicted were not parties to the injunction in any way, and were charged with notice of it because of radio, TV, and newspapers carrying the news concerning its issuance, etc. In other words, all people residing in the area covered by the District Court at Knoxville are charged with notice of the injunction and are bound by the injunction. That is the manner in which the injunction issued in this case is being used. That pattern will no doubt spread to other jurisdictions unless this Court intervenes.

The trials and tribulations of this social revolution are terrific at best, but it is supremely important for this Court to zealously protect the constitutional rights of both factions because that is the only sure way to keep it peaceful. Under the present trend, just a small amount of realism makes one realize matters will get much worse before they get better. Federal troops are believed to be in Little Rock illegally. Never before in our history has "Equal justice under law" been so meaningful and so fervently desired.

Vital constitutional issues in this case are left undecided and others decided, erroneously, and if the

Court would entertain an appeal in this case where all of the issues incident to implementation of the decision of this Court in the Brown case are involved, it would greatly alleviate the dilemma which now exists, because many learned lawyers and judges feel the Federal Courts are functioning in an illegal and unconstitutional realm. A full review in this case would give the Court the opportunity to give the reasons why the Federal Courts have the jurisdiction it is exercising, and if this Court would find there is merit in the points urged by petitioner, then the quicker the errors are corrected, the better.

CONCLUSION

Petitioner submits that this is an ideal case to set down the "ground rules" for the guidance of the lower courts in the rough terrain that lies ahead in this field, even when constitutional rights are protected. The process will be many times more difficult if constitutional rights are "plowed under" in the process. In this area where the hearts and minds of honest men differ, obedience to law is a compelling force if people believe "due process of law" is being followed. Petitioner urges the Court to reconsider its denial of the petition for certiorari and to grant the writ as prayed for.

Respectfully submitted,

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Of Counsel:
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Dated: November 8, 1957

Certificate

I hereby certify that the foregoing petition is presented in good faith and not for purposes of delay, and is restricted to grounds specified in Rule 58 of the Rules of this Court.

November 8, 1957

J. Benjamin Simmons,
Attorney for Petitioner.